OWEN SIM LIANG KHUI

v.

PIASAU JAYA SDN. BHD. & ANOR.

FEDERAL COURT, KUALA LUMPUR
TAN SRI DATO' EDGAR JOSEPH JR FCJ
DATO' PADUKA MOHAMED DZAIDDIN ABDULLAH FCJ
TUAN GOPAL SRI RAM JCA
[CIVIL APPEAL NO: 02-81-94]
24 OCTOBER 1995

CIVIL PROCEDURE: *Affidavits - Admissibility - Rules of the High Court 1980, O. 18 r. 19(1)(a) & (2) - Applications under O. 18 r. 19(1)(b), (c) & (d) and under inherent jurisdiction of Court - Whether evidence admissible - Whether confined to pleadings.*

COMPANY LAW: *Winding up - Petition - Oppression - Disregard - Unfair discrimination - 'Otherwise prejudicial' conduct - Whether to be determined according to facts of each particular case.*

COMPANY LAW: *Winding up - Petition - Oppression - Companies Act 1965, s. 181(1)(a) - Whether oppression must continue right up to date of presentation of petition - Whether s. 181(1)(a) directed at specific or particular acts or omissions - Whether directed at nature of the conduct complained of - Effect of particular acts or omissions.*

COMPANY LAW: *Winding up - Petition - Oppression - Companies Act 1965, s. 181(1)(a) - Effects of a single act or omission - Whether sufficient if effects persist at date of presentation of petition.*

COMPANY LAW: *Winding up - Petition - Companies Act 1965, s. 181(1)(a) - Oppression - 'Mismanagement' - 'Unfairness' - Whether essential elements of concept of oppression - Whether mismanagement or unfairness have to be pleaded in every case of alleged oppression.*

COMPANY LAW: *Winding up - Petition - Companies Act 1965, s. 181 - Whether relief available to majority shareholders also - Circumstances under which relief available*

COMPANY LAW: *Winding up - Petition - Companies Act 1965, s. 181 - Who may present petition - Section 16(6) - Whether petitioner's name must appear on company's register of members at date of presentation of petition - Exceptions - Petitioner deprived of status of member.*

EQUITY: *Estoppel - Nature of doctrine - Companies winding up petition - Whether petitioner can rely on estoppel - Whether company guilty of unconscionable or inequitable conduct will be permitted to raise the requirement of membership to defeat petitioner's standing.*

This was an appeal against the order of the High Court striking out the petitioner's ('the appellant') petition which was presented under s. 181 of the Companies Act 1965 ('the Act').

The appellant held 1,500 shares (out of the 10,000 shares issued and paid up) in the 1st respondent. On 9 July 1991, the 1st respondent wrote to the appellant alleging that the appellant owed it the sum of RM111,734.60. The appellant denied the allegation and claimed, instead, that the 1st respondent was indebted to him in the sum of RM12,500.

Relying on arts. 12 to 15 of its articles of association, the 1st respondent, by its board, resolved that the appellant's shares be sold and the proceeds thereof be applied towards the debt allegedly owed by the appellant. The 1st respondent then gave the appellant notice of the said resolution and demanded that unless the alleged debt was paid within seven days, the resolution would be carried out. The appellant replied and challenged the 1st respondent's claim. However, despite much protest, the 1st respondent went ahead and sold the appellant's shares and transferred the same to the 2nd respondent for the sum of RM16,026.

On 29 January 92, the appellant filed the instant petition, praying, *inter alia*, that the sale and transfer of his shares to the 2nd respondent be declared null and void. On 17 August 1992, the 1st respondent took out a notice of motion under O. 18 r. 19 and O. 92 r. 4 of the Rules of the High Court 1980 ('the RHC') to strike out the said petition.

Although affidavits were filed by both parties, the learned Judge, by reference to O. 18 r. 19(2) of the RHC, disregarded the affidavits filed and proceeded solely on the petition. In the result, the learned Judge dismissed the said petition for not disclosing a reasonable cause of action on three grounds, *viz:* (i) that the said petition did not allege that the 1st respondent had been mismanaged or that there was unfairness on the part of its directors; (ii) that the appellant had, at the date of the presentation of the said petition, ceased to be a member or shareholder of the 1st respondent and, therefore, there was no oppression continuing up to the date of the presentation of the said petition; and (iii) that s. 181(1)(b) of the Act could only be invoked by a member of a company and not by a shareholder.

The appellant appealed.

Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

[1] In excluding the affidavit evidence, it became plain that the learned Judge had overlooked the fact that the 1st respondent was moving the Court, not solely under O. 18 r. 19(1)(a) of the RHC, but was also relying on the other paragraphs of O. 18 r. 19(1) as well as upon the Court's inherent jurisdiction pursuant to O. 92 r. 4. Order 18 r. 19(2) of the RHC prohibits the use of affidavit evidence and confines the Court to the four corners of a pleading only in applications made under O. 18 r. 19(1)(a). It is settled beyond doubt that affidavit evidence is always admissible upon an application made under the other paragraphs of O. 18 r. 19(1) of the RHC or under the inherent jurisdiction of the Court.

[2] It is important to emphasise that much of what Lord Wilberforce said in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* were mere guidelines and not inflexible propositions of law. The question whether there is oppression or disregard or unfair discrimination, or whether the conduct complained of is 'otherwise prejudicial' is one that must eminently be determined according to the facts of each particular case.

[3] It is inaccurate to state, as a proposition of law, that because of the 'present tense' in the language appearing in s. 181(1)(a) of the Act, the oppression complained of must in every case continue right up to the date of the presentation of the petition. Section 181(1)(a) of the Act is not directed at specific or particular acts or omissions. It is directed at the nature of the conduct complained of. And where attention is called to particular acts or omissions, it is the effect of these which has to be considered. It is not (and has never been) the law that the section does not bite where what is complained of is but a single act or omission on the part of the wrongdoers.

[4] A single act or omission may, by its very nature, have so devastating or far-reaching a consequence upon the rights of a member that its effects are permanently felt. For the purposes of s. 181(1)(a) of the Act it is sufficient that the effects of a single act or omission are such that they persist at the date of the presentation of the petition. It is no answer, in those circumstances, for the perpetrators of the act or omission to allege that there has been no continuos oppressive conduct up to the date of the presentation of the petition.

[5] Section 181(1)(a) of the Act, therefore, looks to the effect and consequence of the wrong done in determining whether there is oppressive conduct in any given case. Any other construction upon that

section will denude it of its beneficial effect and frustrate the intention of Parliament.

[6] 'Mismanagement' is not an essential element of the concept of oppression. Consequently, an allegation of mismanagement does not have to be pleaded in every case of alleged oppression to make the petition an acceptable pleading. It all depends on the facts of each case. The same applies to 'unfairness.' Whether there is oppression or unfairness is to be inferentially deduced from the facts of a given case.

[7] In holding that there was no oppression continuing right up to the date of the presentation of the petition, the learned Judge did not sufficiently direct his attention to the effect of the single act complained of by the appellant and alleged by him as amounting to oppression. Had the learned Judge sufficiently and correctly directed himself on the relevant law, he would have looked to the continuing effect of the act complained of and not for a continuing course of conduct.

[8] It is certainly not true that only minority shareholders may apply for relief under s. 181 of the Act. Relief under s. 181 of the Act may be had by a majority of shareholders in circumstances where they are unable for any reason to exert their will at a general meeting of their company.

[9] The terms "members" and "shareholders" in s. 181(1)(a) of the Act refer to the same category of persons within a company. The result, therefore, is that, as a general rule, only one who comes within the ambit of s. 16(6) of the Act may present a petition under s. 181. In general, a petitioner who applies under s. 181 of the Act must be able to demonstrate that his name appears on a company's register of members at the date of the presentation of the petition. If he is unable to do so, then he has no standing to invoke the jurisdiction conferred upon the Court by the section. It must be noted, however, that this is only a general rule and not a universal rule. There may be cases where an application of the general rule will be unfair or unjust – as in the instant case – where the 1st respondent, acting through its board, deprived the appellant of the status of a member. Consequently, it does not lie in the mouth of the alleged wrongdoers to say that the appellant has no ground to stand on after having cut the very ground from under his feet.

[10] The true principle which governs cases such as the instant one is housed in the doctrine of estoppel. The doctrine has reached a stage where it may be applied to prevent or preclude a litigant from raising the provisions of a statute in answer to a claim made against him in circumstances where it would be unjust or inequitable to permit him to do so. The

equitable jurisdiction by which a personal bar is placed upon a litigant from raising or relying upon the provisions of a statute is also contained in the maxim 'equity will not permit statute to be used as an engine of fraud.' The category or class of statutes to which the maxim may be applied are not closed and its development, like much of equity jurisprudence, falls to be dealt with on a case by case basis, taking into account policy considerations that may govern a particular statutory provision.

[11] A respondent who is guilty of unconscionable or inequitable conduct will not be permitted to raise or rely upon the requirement of membership to defeat a petitioner's standing as this would amount to his using 'statute as an engine of fraud.' It does not matter how the proposition is formulated so long it has the effect adverted to.

[12] It matters not that it is the petitioner who relies upon the estoppel. The true nature of the doctrine is not that it cannot not be used to found a cause of action, but that it may be invoked to prevent the respondents from asserting the existence or non-existence of facts, the existence or non-existence of which would destroy a cause of action.

[Appeal allowed; petition restored to file for hearing on the merits.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Afidavit-afidavit - Keboleh-terimaan - Kaedah-kaedah Mahkamah Tinggi 1980, A. 18 k. 19(1)(a) & (2) - Permohonan di bawah A. 18 k. 19(1)(b), (c) & (d) dan di bawah bidangkuasa sedia ada Mahkamah - Samada keterangan boleh diterima - Samada tertakluk kepada pliding-pliding.*

UNDANG-UNDANG SYARIKAT: *Penggulungan - Petisyen - Penindasan - Tidak dihiraukan - Diskriminasi yang tidak adil - Kelakuan "otherwise prejudicial" - Samada harus ditentukan menurut fakta-fakta setiap satu kes yang khusus.*

UNDANG-UNDANG SYARIKAT: *Penggulungan - Petisyen - Penindasan - Akta Syarikat 1965, s. 181(1)(a) - Samada penindasan seharusnya berterusan sehingga tarikh pengemukaan petisyen - Samada s. 181(1)(a) ditujukan kepada perbuatan-perbuatan spesifik atau khusus atau peninggalan - Samada ditujukan pada sifat kelakuan yang diadukan - Kesan perbuatan yang khusus atau peninggalan.*

UNDANG-UNDANG SYARIKAT: *Penggulungan - Petisyen - Penindasan - Akta Syarikat 1965, s. 181(1)(a) - Kesan-kesan satu tindakan atau*

peninggalan - Samada memadai jika kesannya berkekalan sehingga tarikh pengemukaan petisyen.

UNDANG-UNDANG SYARIKAT: *Penggulungan - Petisyen - Akta Syarikat 1965, s. 181(1)(a) - Penindasan - Salah-Urusan - Ketidakadilan - Samada unsur-unsur penting mengenai konsep penindasan - Samada salah pengurusan atau ketidakadilan hendaklah diplidkan dalam setiap satu kes penindasan.*

UNDANG-UNDANG SYARIKAT: *Penggulungan - Petisyen - Akta Syarikat 1965, s. 181 - Samada relif terbuka kepada pemegang saham majoriti - Keadaan di mana terdapat relif.*

UNDANG-UNDANG SYARIKAT: *Penggulungan - Petisyen - Akta Syarikat 1965, s. 181 - Siapa yang mungkin mengemukakan petisyen - Seksyen 16(6) - Samada nama petisyen mesti terdapat dalam daftar ahli-ahli bagi syarikat pada tarikh pengemukaan petisyen - Pengecualian - Pempetisyen terlucut hak dari status ahli.*

EKUITI: *Estopel - Sifat doktrin - Petisyen penggulungan syarikat - Samada pempetisyen boleh bergantung pada estopel - Samada syarikat yang bersalah atas kelakuan yang tidak berpatutan dan tak saksama boleh dibenarkan untuk membangkitkan syarat keahlian untuk mematahkan pendirian pempetisyen.*

Ini merupakan rayuan terhadap perintah Mahkamah Tinggi yang membatalkan petisyen perayu/pempetisyen yang telah dikemukakan di bawah s. 181 Akta Syarikat 1965 (‘Akta tersebut’)

Perayu tersebut memegang 1,500 saham, daripada 10,000 yang diterbitkan dan dibayar, dalam syarikat responden pertama. Pada 9 Julai 1991, responden telah menulis kepada perayu mengatakan bahawa beliau terhutang padanya satu jumlah sebanyak RM111,734.60. Perayu tersebut menafikannya dan sebaliknya menuntut bahawa responden tersebut terhutang padanya dalam jumlah sebanyak RM12,500.

Bergantung pada artikel-artikel 12 hingga 15 tata-urusan persatuannya, responden melalui lembaganya menetapkan bahawa saham-saham perayu hendaklah dijual dan hasilnya digunakan terhadap hutang yang dikatakan terhutang oleh perayu kepada responden. Responden tersebut kemudiannya memberikan perayu notis ketetapan tersebut dan menuntut bahawa kecuali hutang yang dikatakan itu dibayar dalam tempoh tujuh hari, ketetapan tersebut akan dilaksanakan. Perayu tersebut telah menjawab dan mencabar tuntutan responden. Walaubagaimanapun, sungguhpun terdapat bantahan yang kuat,

responden tersebut telah terus menjual saham-saham perayu tersebut dan memindahkannya kepada responden kedua bagi jumlah sebanyak RM16,026.

Akibatnya, pada 29 Januari 1992, perayu telah memfailkan petisyen semasa ini, menuntut antara lainnya, bahawa penjualan dan pemindahan saham-saham tersebut kepada responden kedua diisytiharkan sebagai batal dan tak sah. Pada 17 Ogos 1992, responden pertama telah mengeluarkan satu notis usul di bawah A. 18 k. 19 dan A. 92 k. 4 Kaedah-kaedah Mahkamah Tinggi ('RHC') untuk membatalkan petisyen tersebut.

Walaupun afidavit-afidavit telah difailkan oleh kedua-dua pihak, Hakim yang bijaksana tersebut namun begitu, dengan rujukan kepada A. 18 k. 19(2) RHC, telah tidak menghiraukan afidavit-afidavit yang telah difailkan itu dan meneruskan semata-mata atas petisyen tersebut dan menolaknya kerana tidak mendedahkan kausa tindakan yang wajar atas tiga alasan: (a) bahawa petisyen itu tidak mengatakan bahawa responden telah disalah-uruskan. Ianya juga tidak mengatakan apa-apa ketidakadilan yang dilakukan pengarah-pengarah; (b) bahawa perayu tersebut telah, pada tarikh pengemukaan petisyen tersebut, tidak lagi menjadi ahli atau pemegang saham responden. Dengan itu tidak terdapat penindasan yang berterusan sehingga kepada tarikh pengemukaan petisyen tersebut; dan (c) seksyen 181(1)(b) Akta tersebut hanya boleh digunakan oleh seorang ahli sesebuah syarikat dan bukannya oleh seseorang pemegang saham.

Perayu kemudiannya merayu.

Diputuskan:

Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):

[1] Ianya jelas bahawa Hakim yang bijaksana tidak memberi perhatian kepada fakta bahawa responden sedang mengusul Mahkamah, bukan sahaja di bawah perenggan (a) A. 18 k. 19(1) RHC tetapi juga bergantung pada perenggan-perenggan yang lain dan juga atas bidangkuasa sedia ada Mahkamah. Kaedah kecil 2 A. 18 k. 19 RHC melarang penggunaan keterangan afidavit dan hanya menetapkan Mahkamah kepada empat penjuru sesuatu pliding hanya dalam permohonan yang dibuat di bawah A. 18 k. 19(1)(a). Ianya jelas tanpa diragui bahawa keterangan afidavit adalah selalunya boleh diterima atas satu permohonan yang dibuat di bawah perenggan-perenggan yang lain A. 18 k. 19(1) RHC atau di bawah bidangkuasa sedia ada Mahkamah.

[2] Adalah adalah penting untuk menegaskan bahawa sebahagian besar daripada apa yang diperkatakan oleh Lord Wilberforce dalam *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* adalah hanya merupakan garispanduan semata-mata dan bukannya proposisi yang tidak fleksibel. Persoalan

samada terdapatnya penindasan atau tidak mempedulikan atau diskriminasi yang tidak adil atau samada kelakuan yang diadukan adalah "sebaliknya memudaratkan" adalah sesuatu yang sangat perlu ditentukan menurut fakta-fakta setiap satu kes yang khusus.

[3] Adalah tidak tepat untuk menyatakan sebagai satu proposisi undang-undang, bahawa oleh kerana 'present tense' yang terdapat dalam s. 181(1)(a) Akta tersebut, penindasan yang diadukan mestilah dalam setiap kes berlanjutan sehingga kepada tarikh pengemukaan petisyen tersebut. Perenggan (a) kepada seksyen kecil pertama dari s. 181 Akta tersebut tidak ditujukan kepada perbuatan-perbuatan atau peninggalan yang khusus. Ianya ditujukan pada sifat kelakuan yang diadukan dan dimana perhatian diminta untuk memerhatikan perbuatan-perbuatan atau peninggalan yang khusus, kesan perkara inilah yang khusus dipertimbangkan.

[4] Satu perbuatan atau peninggalan boleh, menurut sifatnya, mempunyai akibat yang membinasakan atau luas atas hak seseorang ahli hinggakan kesannya boleh secara kekal dirasakan. Bagi tujuan s. 181(1)(a) Akta tersebut ianya memadai bahawa kesan sesuatu perbuatan atau peninggalan adalah sedemikian rupa hinggakan ianya berterusan pada tarikh pengemukan tersebut bukanlah jawapan dalam keadaan tersebut, bagi mereka yang melakukan perbuatan atau peninggalan itu untuk mengatakan bahawa tidak terdapat kelakuan penindasan yang berterusan sehingga kepada tarikh pengemukaan petisyen tersebut.

[5] Seksyen 181(1)(a) Akta tersebut dengan itu melihat kesan dan akibat kesalahan yang dilakukan dalam menentukan samada terdapat kelakuan yang menindas dalam mana-mana kes yang dikemukakan. Apa-apa pembentukan yang lain ke atas seksyen tersebut akan memusnahkan hak benefisialnya dan membantutkan niat Parlimen.

[6] 'Pengurusan salah' bukanlah satu unsur yang terpenting dalam konsep penindasan. Akibatnya sesuatu pengataan mengenai pengurusan salah tidak perlu diplidkan dalam setiap kes penindasan bagi menjadikan petisyen itu satu pliding yang boleh diterima. Ianya bergantung pada fakta-fakta setiap kes. Begitu juga dengan ketidak-adilan. Samada terdapatnya penindasan atau ketidak-adilan hendaklah dibuat kesimpulan secara logik berasaskan fakta-fakta sesuatu kes yang diberikan.

[7] Dalam memutuskan bahawa tidak terdapat penindasan yang berterusan sehingga kepada tarikh pengemukakan petisyen tersebut, Hakim yang bijaksana tidak mengarahkan perhatiannya kepada kesan perbuatan yang perayu katakan adalah suatu penindasan. Sekiranya Hakim yang bijaksana

telah dengan betul dan secukupnya mengarahkan dirinya menurut undang-undang yang releven, beliau tentunya telah memberi perhatian kepada kesan berterusan perbuatan yang diadukan dan bukannya kepada satu perjalanan perlakuan yang berterusan.

[8] Adalah tidak benar bahawa hanya pemegang-pemegang saham minoriti yang boleh memohon untuk mendapatkan relief di bawah s. 181 Akta tersebut. Relief di bawah s. 181 Akta tersebut boleh diperolehi oleh satu majoriti pemegang-pemegang saham dalam keadaan di mana mereka tidak dapat atas apa-apa alasan untuk mengusahakan kemahuan mereka di sesuatu mesyuarat agong syarikat mereka.

[9] Ungkapan "ahli", dan "pemegang saham" dalam s. 181 Akta tersebut merujuk kepada orang-orang dalam kategori yang sama dalam syarikat. Dengan itu hasilnya adalah bahawa sebagai satu amalan biasa hanya seseorang yang terlingkung dalam maksud ungkapan s. 16(6) Akta tersebut boleh mengemukakan petisyen di bawah s. 181 Akta tersebut. Secara amnya seseorang pempetisyen yang memohon di bawah s. 181 haruslah menunjukkan bahawa namanya terdapat dalam daftar ahli-ahli sesebuah syarikat pada tarikh pengemukaan petisyen itu. Jika beliau tidak dapat berbuat sedemikian, maka beliau tidak berpendirian. Namun begitu haruslah diambil perhatian bahawa ini hanyalah merupakan satu kaedah atau amalan umum dan bukanya satu kaedah universal. Mungkin terdapat kes-kes di mana pemakaian kaedah umum itu adalah tidak adil ataupun tidak wajar, sebagaimana keadaan dalam kes semasa ini. Ianya adalah perbuatan responden melalui lembaganya yang telah melucuthak perayu dari status atau kedudukan seorang ahli. Dengan itu ianya tidak terpulang pada pelaku kesalahan itu untuk menyatakan bahawa perayu tidak mempunyai alasan untuk berpaling sedangkan hak alasan itu telah dirampaskan daripadanya.

[10] Prinsip sebenar yang menguasai kes-kes sedemikian sebagaimana kes semasa ini terkandung dalam doktrin estopel. Doktrin itu telah mencapai satu tahap di mana ianya boleh dipakai untuk menghalang atau meneguh seseorang litigan daripada membangkitkan penentuan sesuatu statut sebagai jawapan kepada satu tuntutan yang dibuat terhadapnya dalam mana ianya akan menjadi tidak adil atau tak saksama untuk membenarkannya melakukan sedemikian. Bidangkuasa ekuiti melalui yang mana sesuatu halangan diletakkan ke atas litigan daripada membangkitkan atau bergantung pada peruntukan-peruntukan sesuatu status juga terkandung dalam maxim 'ekuiti tidak akan membenarkan statut digunakan sebagai satu peralatan fraud'. Kategori atau kelas statut-statut kepada mana maxim itu boleh dipakai tidak tertutup dan kemajuannya seperti kebanyakan ekuiti jurisprudens, haruslah diuruskan atas dasar setiap satu

kes dengan mengambilkira pertimbangan-pertimbangan dasar yang mungkin menguasai sesuatu peruntukkan berkanun yang khusus.

[11] Responden yang bersalah atas perbuatan yang tak saksama atau tak munasabah tidak akan dibenarkan untuk membangkitkan atau bergantung pada kehendak-kehendak keahlian bagi mengalahkan pendirian pempetisyen kerana ini akan membawa kepada beliau menggunakan statut sebagai satu peralatan fraud. Ianya tidak dipedulikan bagaimana proposisi itu dibentuk asalkan ianya mempuyai kesan terhadap mana ianya dirujuk.

[12] Adalah tidak dihiraukan bahawa ianya merupakan pempetisyen yang telah bergantung atas estopel kerana sifat sebenar doktrin itu adalah bukannya kerana ianya tidak boleh digunakan untuk mengasakan sesuatu kausa tindakan, tetapi bahawa ianya boleh digunakan untuk menghalang responden daripada menegaskan kewujudan atau ketidak-wujudan yang mana akan memusnahkan sesuatu kausa tindakan.

[Rayuan dibenarkan. Petisyen dipulihkan kepada fail untuk perbicaraan berdasarkan merit-merit]

Cases referred to:

Tractors Malaysia Bhd. v. Tio Chee Hing [1975] 2 MLJ 1 ***(cit)***
Raja Zainal Abidin bin Raja Haji Tachik & Ors. v. British-American Life & General Insurance Bhd. [1993] 3 CLJ 606 ***(cit)***
Re Kong Thai Sawmill (Miri) Sdn. Bhd. [1978] 2 MLJ 227 ***(refd)***
Foss v. Harbottle [1843] 67 ER 190 ***(cit)***
Mozley v. Alston [1847] 41 ER 833 ***(cit)***
Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2) [1982] 1 All ER 354 ***(refd)***
Menier v. Hooper's Telegraph Works [1874] 9 Ch. App. 350 ***(cit)***
MacDougall v. Gardiner [1875] 1 Ch. D. 13 ***(cit)***
Burland v. Earle [1902] AC 83 ***(cit)***
Tan Guan Eng v. Ng Kweng Hee [1991] 3 CLJ 1881 ***(cit)***
Biala Pty Ltd. v. Mallina Holdings Ltd. (No. 2) [1993] 11 ACLC 1,082 ***(cit)***
Bamford v. Bamford [1970] Ch. 212 ***(refd)***
Paidiah Genganaidu v. The Lower Perak Syndicate Sdn. Bhd. & Ors. [1974] 1 MLJ 220 ***(cit)***
Scottish Co-operative Wholesale Society Ltd. v. Meyer [1958] 3 All ER 66 ***(refd)***
Re Senson Auto Supplies Sdn. Bhd. [1988] 1 MLJ 326 ***(foll)***
Re Sindhri Iron Foundry (P) Ltd. [1964] 34 Comp. Cas. 510 ***(foll)***
Ramashankar Prosad v. Sindhri Iron Foundry (P) Ltd. AIR [1966] Cal. 512 ***(refd)***
Re H.R. Harmer Ltd. [1959] 1 WLR 62 ***(refd)***
Kumagai Gumi Co. Ltd. v. Zenecon-Kumagai Sdn. Bhd. & Ors. [1994] 2 MLJ 789 ***(foll)***
Thomas v. H.W. Thomas Ltd. [1984] 2 ACLC 610 ***(refd)***

Alfred Templeton & Ors. v. Low Yat Holdings Sdn. Bhd. & Anor. [1989] 2 MLJ 202 ***(cit)***
West v. Pollack & Freemantle [1937] TPD (SA) 64 ***(cit)***
Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 ***(cit)***
Rasiah Munusamy v. Lim Tan & Sons Sdn. Bhd. [1985] 2 MLJ 291 ***(cit)***
Bannister v. Bannister [1948] 2 All ER 133 ***(cit)***
Bahr & Anor. v. Nicolay & Ors. (No. 2) [1987] 164 CLR 604 ***(cit)***
Bandar Builder Sdn. Bhd. v. United Malayan Banking Corporation Bhd. [1993] 4 CLJ 7 ***(foll)***

Legislation referred to:
Companies Act 1955, s. 209
Companies Act 1965, ss. 4, 16(6), 181(1)(a), (b)
Companies Act 1956 [India], s. 397(1)
Companies Act 1948 [UK], s. 210
Companies Act 1985 [UK], s. 459
Rules of the High Court 1980, O. 18 rr. 19(1)(a), (b), (c), (d), 19(2), O. 92 r. 4
Uniform Companies Act 1961 [Australia], s. 186

[Appeal from High Court Borneo, Miri; Originating Petition No: MR 1 of 1992]

For the appellant - Bong Ah Loi; M/s. Raymond Lam & Assoc.
For the respondents - M.S. Sandhu; M/s. M.S. Sandhu & Co.

JUDGMENT

Gopal Sri Ram JCA:

This is an appeal against the order of the learned Judge of the High Court sitting at Miri striking out the appellant's petition presented under the provisions of s. 181 of the Companies Act 1965 ('the Act'). We heard the appeal on 25 September 1995 and allowed it, indicating to Counsel that reasons for our decision would be given. These now follow.

The brief facts of the case are these. The first respondent is a private company ('the company') limited by shares. It has an authorised share capital of 250,000 shares of which 10,000 have been issued and paid up. Until 3 August 1991, the appellant was a registered shareholder in it. He held 1,500 shares.

On 9 July 1991, the company wrote to the appellant alleging that he owed it a sum of RM111,734.60. The appellant vehemently denies owing this or any other sum to the company. He claims that it is the company that is indebted to him in the sum of RM12,500.

On 25 July 1991, the company's board resolved that the appellant's shares shall be sold at a value to be determined by an independent valuer. The

proceeds of sale were to be applied towards the debt allegedly owed by the appellant to the company. By a letter dated 26 July 1991, the company informed the appellant of the resolution of its board and gave him seven days to settle the sum of RM111,734.60, failing which his shares would be sold. In taking this step, the company's board were no doubt relying on arts. 12 through 15 of its articles of association which are in the following terms:

> 12. The company shall have a first and paramount lien upon all shares, (whether fully paid or not) registered in the name of any member, either alone or jointly with any other person, for his debts, liabilities and engagements, whether solely or jointly with any other person, to or with the company, whether the period for the payment, fulfilment or discharge thereof shall have actually arrived or not, and such lien shall extend to all dividends from time to time declared in respect of such shares. But the directors may at any time declare any share to be exempt, wholly or partially, from the provisions of this article.
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> 13. The directors may sell the shares subject to any such lien at such time or times and in such manner as they think fit, but no sale shall be made until such time as the moneys in respect of which such lien exists or some part thereof are or is presently payable or the liability or engagement in respect of which such lien exists is liable to be presently fulfilled or discharged, and until a demand and notice in writing stating the amount due or specifying the liability or engagement and demanding payment or fulfilment or discharge thereof and giving notice of intention to sell in default shall have been served on such member or the persons (if any) entitled by transmission to the shares, and default in payment, fulfilment or discharge shall have been made by him or them for seven days after such notice.
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> 14. The net proceeds of any such sale shall be applied in or towards satisfaction of the amount due to the company or of the liability or engagement, as the case may be, and the balance (if any) shall be paid to the member or the person (if any) entitled by transmission to the shares so sold.
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> 15. Upon any such sale as aforesaid, the directors may authorise some person to transfer the shares sold to the purchaser, and may enter the purchaser's name in the register as holder of the shares, and the purchaser shall not be bound to see to the application of the purchase money nor shall his title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale.

On 30 July 1991, the appellant replied, challenging the company's claim that he was indebted to it and putting in issue the existence of any lien attaching to his shares. Those in control of the company's board were obviously deaf to the protestations of the appellant. On 12 August 1991, the company (in reality the board) wrote to the appellant informing him that his shares had been

sold and transferred to the second respondent on 3 August 1991, for a sum of RM16,026 and that this sum had been applied in partial satisfaction of the alleged indebtedness. That letter also demanded of the appellant the sum outstanding after deduction of the price obtained on the sale of his shares.

On 29 January 1992, the appellant presented a petition under s. 181 of the Act. In it he recited the facts we have earlier alluded to. Additionally he challenged the price at which his shares had been disposed. In para. 11 of the petition he formulated his complaint in these words:

> 11. By reasons aforementioned, the sale and transfer of the said shares to the 2nd respondent was transacted in a manner that is oppressive to your petitioner's interest as shareholder of the company or that the act of the 1st respondent unfairly discriminates or is otherwise prejudicial to your petitioner as a member of the 1st respondent by virtue of s. 181 of Companies Act 1965.

On the basis of the matters pleaded in the petition, the appellant claimed the following relief:

> (a) that the said sale and transfer of the said shares to the 2nd respondent be declared null and void by virtue of s. 181 (2)(a) Companies Act 1965;
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> (b) that the register of the members be rectified pursuant to s. 162 of the Companies Act 1965 by striking out the name of the 2nd respondent therefrom as holder of the said shares and by re-inserting in lieu thereof the name of your petitioner as holder of the said shares;
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> (c) that your petitioner be authorised to effect the necessary alterations in the register of the members for carry *(sic)* such order, into effect;
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> (d) that the notice of such rectification be ordered to be given to the Registrar of Companies; and
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> (e) that such other order may be made in the premises as the Court shall deem fit.

The petition was accompanied by an affidavit affirmed on the same date as its presentation in which the averments pleaded in the former are regurgitated.

On 17 August 1992, the company took out a notice of motion under O. 18 r. 19 and O. 92 r. 4 of the Rules of the High Court 1980 to strike out the petition on the ground that it disclosed no reasonable cause of action or was scandalous, frivolous, vexatious or was an abuse of the process of the Court; alternatively that the reliefs sought therein ought to have been sought by way of an originating summons. The reference in the notice of motion to O. 92 r. 4 was, no doubt, with a view to invoking, by way of alternative, the inherent jurisdiction of the Court to deal with an abuse of its process.

Following the service of the notice of motion there was an exchange of affidavits containing various allegations which we do not propose to go into. Suffice it to say that the company alleged that the debt had been admitted by the appellant, while the appellant denied any admission of it. Clearly, therefore, it was not appropriate for a Court to have attempted to resolve the conflict of evidence on affidavits.

To resume the narrative of events, for reasons which we were not advised of, the company's notice of motion, though filed in August 1992, was made returnable only on 8 March 1993. There is nothing in the record provided to show that the notice of motion ever came up for disposal on that date. The record does, however, reflect that it was eventually heard over two days, namely, 25 and 26 January 1994. The learned Judge, acting with commendable speed, delivered his written judgment on 29 January 1994 and made this available on 25 February 1994. There was, therefore, a lapse of approximately 17 months between the date of filing of the motion and its final disposal. We must say that we are unable to comprehend the very long delay in the disposal of what is essentially a simple interlocutory proceeding. It must not be forgotten that Courts exist to do justice with some expedition. And while justice ought not to be sacrificed at the risk of being done too speedily, Courts must act to ensure that the delays of the law do not become intolerable. In the present case we are unable to see why the company's notice of motion could not have been fixed and dealt with within a time span of two or even three months at the most.

Before we turn to consider the reasons given by the learned Judge for striking out the appellant's petition there is a point of procedure which requires to be addressed.

It would appear that when considering the company's notice of motion, the learned Judge confined himself to the petition and disregarded the affidavit evidence that had been tendered before him. For this is what he said:

> Further am I reminded by para. 2 thereof [The reference here is to O. 18 r. 19(2)] that no affidavit evidence is admissible. Although IRA No. 1 [the company's affidavit] is taken as read, I entirely disregard it in my consideration of the main issue and proceed solely on the basis of the petition.

In a later passage he said:

> PA. No. 1 [the appellant's affidavit] is an affidavit and an affidavit is not a pleading; thus I disregard it for the purpose of the main issue.

Now, we must say at once that we are unable to agree with the approach taken by the learned Judge. It is plain that he overlooked the fact that the company was moving the Court, not only under para. (a) of O. 18 r. 19(1)

but was also relying on the other paragraphs of that rule and upon the Court's inherent jurisdiction. That this is indeed the true position may be gathered from the words of the first prayer in the motion which uses the language appearing in paras. (b), (c) and (d) of O. 18 r. 19(1). Order 18 r. 19(2) prohibits the use of affidavit evidence and confines the Court to the four corners of a pleading only in applications made under para. (a). It is settled beyond doubt that affidavit evidence is always admissible upon an application made under the other paragraphs of O. 18 r. 19(1) or under the inherent jurisdiction of the Court. See *Tractors Malaysia Bhd. v. Tio Chee Hing* [1975] 2 MLJ 1; *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd.* [1993] 3 CLJ 606; [1993] 3 MLJ 16.

In deciding to exclude from his consideration relevant and admissible evidence, the learned Judge, apart from misdirecting himself on the correct legal principles, certainly failed to take into account relevant considerations. His decision on the merits of the application before him cannot therefore be treated as being unimpeachable on appeal.

We now come to the learned Judge's reasons for holding that the petition did not disclose a reasonable cause of action. After citing the decision of the Privy Council in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1978] 2 MLJ 227 the learned Judge went on to say as follows:

> I am satisfied on the pleading that no mention is made of any mismanagement of the 1st respondent's affairs or any reference to the directors of the 1st respondent, their powers under the articles of association or any exercise thereof fairly or unfairly. I am further satisfied on the pleading that the petitioner ceased to be a shareholder and member of the 1st respondent on 3 August 1991 and that if there was any oppression, it would have ceased on that date and could not have continued up to 11 February 1992 the date the petition was filed.
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> I read s. 181(1)(b) of Act 125 to apply only to members and holders of debentures or any class of members or debenture holders. It does not apply to shareholders as such. Consequently, the act done or threatened or the resolution passed which are alleged to be unfairly discriminatory or otherwise prejudicial are directed towards members or debenture holders or any class of them.
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> Insofar as para. 11 purports to make out a cause of action under s. 181 of Act 125, for the reasons expressed above, it has to my mind failed and such failure is attributed to a miscomprehension of s. 181. In the premises I am satisfied that the petition does not disclose any reasonable cause of action under s. 181 of Act 125.
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> On the other hand, I am satisfied on the pleading that the petition does raise a dispute as to title to the 1,500 shares under Certificate No. 006 to entitle the petitioner to bring a cause of action under s. 162 of Act 125 against the 1st and 2nd respondents but I note that there is non-compliance with O. 88 r. 3 as the

action here is brought by way of originating petition and there is no way I can regard it as an originating summons or originating motion.

From the foregoing passages it is apparent that the learned Judge based his decision to strike out the petition on three grounds. These may be summarised as follows:

(1) The petition does not allege that the company has been mismanaged. Neither does it allege any unfairness on the part of the directors;

(2) The appellant had, at the date of presentation of the petition, ceased to be a member or shareholder of the company. There was therefore no oppression continuing up to the date of the presentation of the petition; and

(3) Section 181(1)(b) may only be invoked by a member of a company and not by a shareholder.

Before we deal with each of the foregoing grounds, we wish to take this opportunity to examine the historical background to, and restate the principles governing, s. 181 of the Act. We are satisfied such an examination will demonstrate that the learned Judge erred in taking too restrictive an approach to the case before him and misunderstood the true nature and purport of the section now under consideration.

Traditionally, Courts have been reluctant to interfere with matters relating to the internal management of incorporated companies. Through a series of decisions of the Court of Chancery in the mid-19th century, they administered unto themselves a jurisdictional prohibition from entering upon domestic disputes between corporators. Two landmark decisions settled the law upon the subject for all time. The first of these was *Foss v. Harbottle* [1843] 67 ER 190; the second was *Mozley v. Alston* [1847] 41 ER 833.

In time it was accepted that what has come to be known as the rule in *Foss v. Harbottle* has two limbs. They are set out in the joint judgment of Cumming-Bruce, Templeman and Brightman LJJ in *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2)* [1982] 1 All ER 354, 357:

A derivative action is an exception to the elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and therefore the person in whom the cause of action is vested. This is sometimes referred to as the rule in *Foss v. Harbottle* [1843] 2 Hare 461, 67 ER 189 when applied to corporations, [the first limb] but it has a wider scope and is fundamental to any rational system of jurisprudence. The rule in *Foss v. Harbottle* also embraces a related principle, [the second limb] that *an individual shareholder cannot bring an action in the Courts to complain*

> *of an irregularity (as distinct from an illegality) in the conduct of the company's internal affairs provided that the irregularity is one which can be cured by a vote of the company in general meeting.* We are not concerned with this aspect of the rule. (Emphasis added.)

Subsequent cases, while reiterating the rule in *Foss v. Harbottle* recognised the existence of exceptions to it. See *Menier v. Hooper's Telegraph Works* [1874] 9 Ch. App. 350; *MacDougall v. Gardiner* [1875] 1 Ch. D. 13; *Burland v. Earle* [1902] AC 83. A recent and elucidating summary of these exceptions is to be found in the judgment of Edgar Joseph Jr. J (as he then was) in *Tan Guan Eng v. Ng Kweng Hee* [1991] 3 CLJ 1881; [1992] 1 MLJ 487. A further exception to the first limb of the rule has been rightly recognised in Australia. See *Biala Pty. Ltd. v. Mallina Holdings Ltd. (No. 2)* [1993] 11 ACLC 1082.

But we need say no more about the first limb for, unlike the English Court of Appeal in *Prudential Assurance (supra),* we are here concerned with the second limb, not the first. A restatement of the judicial philosophy of non-interference was made in *Bamford v. Bamford* [1970] Ch. 212, where Harman LJ said:

> It is trite law, I had thought, that if directors do acts, as they do every day, especially in private companies, which, perhaps because there is no quorum, or because their appointment was defective, or because sometimes there are no directors properly appointed at all, or because they are actuated by improper motives, they go on doing for years, carrying on the business of the company in the way in which, if properly constituted, they should carry it on, and then they find that everything has been so to speak wrongly done because it was not done by a proper board, such directors can, by making a full and frank disclosure and calling together the general body of the shareholders, obtain absolution and forgiveness of their sins; and provided the acts are not *ultra vires* the company as a whole everything will go on as if it had been done all right from the beginning. I cannot believe that that is not a commonplace of company law. It is done every day. Of course, if the majority of the general meeting will not forgive and approve, the directors must pay for it.

Thus, in the United Kingdom, until 1948, a minority shareholder who wished to sue had to bring himself within one of the exceptions created by Courts of Equity to the rule in *Foss v. Harbottle:* what came to be called minority shareholder actions. In that year there was passed the Companies Act 1948 (United Kingdom) which, in s. 210, appearing under the heading 'Minorities', created a limited exception to the rule by providing an alternative remedy to winding-up upon proof of oppression. Not long thereafter, similar provisions appeared in the company law legislation of other Commonwealth jurisdictions, including South Africa, India, Australia, New Zealand and Canada. All these were *in pari materia* with the United Kingdom statute. The effect of all this

legislation was not to abrogate but to introduce limited exceptions to the rule in *Foss v. Harbottle*.

Digressing for a moment, it is noteworthy that the Companies Ordinance 1940, of the Straits Settlements which was extended to the Malayan Union, and later to the then Federation of Malaya, did not contain any provision resembling the United Kingdom s. 210. Malaysian Courts have consistently applied the rule in *Foss v. Harbottle* and have denied relief to a plaintiff in a minority shareholder's action who has been unable to bring himself within any one of the exceptions to the rule. See, for example, *Paidiah Genganaidu v. The Lower Perak Syndicate Sdn. Bhd. & Ors.* [1974] 1 MLJ 220.

The approach to the construction of the narrowly worded United Kingdom s. 210 is to be found in the speech of Lord Denning in *Scottish Co-operative Wholesale Society Ltd. v. Meyer* [1958] 3 All ER 66, at p. 89:

> True it is that in this, as in other respects, your Lordships are giving a liberal interpretation to s. 210. But it is a new section designed to suppress an acknowledged mischief. When it comes before this House for the first time it is, I believe, in accordance with long precedent - and particularly with the resolution of all the Judges in *Heydon's Case* ([1584] 3 Co. Rep. 7a) - that your Lordships should give such construction as shall advance the remedy. And that is what your Lordships do today.

The first move towards further legislative liberalisation of the remedy appears to have been the Uniform Companies Act 1961 of Australia which introduced s. 186 which was wider in terms than s. 210 of the United Kingdom statute but narrower than our s. 181. Subsequently, Australia, New Zealand, the United Kingdom and Canada legislated provisions, resembling s. 181 though the latter is of wider import, particularly in regard to the powers of the Court to grant relief to shareholders. The decisions of the Courts of these countries upon pieces of such legislation, though often helpful, especially in the absence of local authority, must be applied with caution.

We now turn to consider the provisions of s. 181 of the Act which is in the following terms:

> 181(1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground –
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> (a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

(2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may –

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in future;

(c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;

(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or

(e) provide that the company be wound up.

(3) Where an order that the company be wound up is made pursuant to sub-section (2)(e) the provisions of this Act relating to winding-up of a company shall, with such adaptations as are necessary, apply as if the order had been made upon a petition duly presented to the Court by the company.

(4) Where an order under this section makes any alteration in or addition to any company's memorandum or articles, then, notwithstanding anything in any other provision of this Act, but subject to the order, the company concerned shall not have power without the leave of the Court to make any further alteration in or addition to the memorandum or articles inconsistent with the order; but subject to the foregoing provisions of this subsection the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company.

(5) An office copy of any order made under this section shall be lodged by the applicant with the Registrar within fourteen days after the making of the order.

Penalty: One thousand ringgit. Default penalty.

In *Re Kong Thai Sawmill (supra)*, Lord Wilberforce, when delivering the advice of the Privy Council adverted to the differences between s. 181 and other equivalent foreign provisions and in the process laid down certain guidelines as to how the section is to be approached. This is what he said (at pp. 228-229 of the report):

This section can trace its descent from s. 210 of the United Kingdom Companies Act 1948 which was introduced in that year in order to strengthen the position of minority shareholders in limited companies. It also resembles the rather wider s. 186 of the Australian Companies Act 1961. But s. 181 is in important respects different from both its predecessors and is notably wider in scope than the United Kingdom section. In sub-section (1)(a) it adds disregard of the interests of members, etc. to oppression as a ground for relief in this respect making explicit what was already inherent in the section (see In *re H.R. Harmer Ltd.* [1959] 1 WLR 62, at p. 75). It introduces a new ground in sub-section (1)(b) and, most importantly, in sub-section 2, which sets out the kinds of relief which may be granted, it provides for "remedying the matters complained of" and states as a specific type of relief that of winding-up of the company.

Section 210 is differently constructed. Under it, the Court is required to find that the facts would justify the making of a winding-up order under the 'just and equitable' provision in the Act, but also that to wind-up the company would unfairly prejudice the 'oppressed' minority. The Malaysian section, on the other hand, requires (under sub-section 1(a)) a finding of 'oppression' or 'disregard', and then leaves to the Court a wide discretion as to the relief which it may grant, including among the options that of winding the company up. That option ranks equally with the others, so that it is incorrect to say that the primary remedy is winding-up. That may have been so before 1948 and even after the enactment of s. 210, but is not the case under s. 181.

Their Lordships consider it important that Courts applying s. 181 should do so according to its terms and its purpose and should not regard themselves as necessarily bound by United Kingdom decisions, which are based upon a different section, and in some cases restrictive. The same applies, though with less force, to reliance upon Australian decisions upon s. 186.

There are three particular points of direct relevance in the present appeal. First, it is claimed by the appellants that the section is not a substitute for a minority shareholders' action and, specifically, that many if not most of the matters complained of would properly form the subject of such an action. Their Lordships agree with this in part. Relief cannot be sought under s. 181 merely because facts are established which would found a minority shareholders' action: the section requires (relevantly) 'oppression' or 'disregard' to be shown, and these are not necessary elements in the action referred to. But if a case of 'oppression' or 'disregard' is made out, the section applies and it is no answer to say that relief might also have been obtained in a minority shareholders' action. To the extent that the appellants so contend their Lordships do not accept their argument.

Secondly, for the case to be brought within s. 181(1)(a) at all, the complaint must identify and prove 'oppression' or 'disregard'. The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. Those who take interests in companies limited by shares have to accept majority rule. It is only when majority

rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be evoked. As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made (*Elder v. Elder & Watson Ltd.* [1952] SC 49: their Lordships would place the emphasis on 'visible'. And similarly 'disregard' involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in *Thompson v. Drysdale* [1925] SC 311, at p. 315). Neither 'oppression' nor 'disregard' need be shown by a use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line.

Thirdly, in a number of United Kingdom decisions it has been held that for s. 210 to apply the complainant must show oppression continuing up to the date of proceedings (e.g. In *Re Jermyn Street Turkish Baths Ltd.* [1971] 1 WLR 1042); where there has been oppression in the past, the section does not bite. Their Lordships agree that the wording of the section (and the same is true of s. 181(l)(a)) relates to a present state of affairs: 'are being conducted', powers 'are being exercised' are grammatically clear: the language may be contrasted with that of s. 181(l)(b) which refers to an act of the company which has been done or threatened. But this argument must not be taken too far. What is attacked by sub-section (1)(a) is not particular acts but the manner in which the affairs of the company are being conducted or the powers of the directors exercised. And these may be held to be 'oppressive' or 'in disregard' even though a particular objectionable act may have been remedied. A last minute correction by the majority may well leave open a finding that, as shown by its conduct over a period, a firm tendency or propensity still exists at the time of the proceedings to oppress the minority or to disregard its interests so calling for a remedy under the section. This point is well brought out in *Re Bright Pine Mills Pty. Ltd.* [1969] VR 1002, at pp. 1011-2.

Their Lordships have made these observations upon the Malaysian s. 181, not because they disagree with the statement of the law by the Federal Court - which indeed recognised the wider scope of s. 181 as compared with the corresponding provisions in England and in Australia. They are concerned rather to emphasise the utility of the jurisdiction conferred upon the Courts in Malaysia, and to deal with particular arguments urged in this case with some of which they do not agree.

It is important to emphasise that much of what Lord Wilberforce said in his advice were mere guidelines and not inflexible propositions of law: for, the question whether there was oppression or disregard or unfair discrimination or whether the conduct complained of was "otherwise prejudicial" is one that must eminently be determined according to the facts of each particular case. This

is well illustrated by the carefully reasoned judgment of Edgar Joseph Jr J (as he then was) in *Re Senson Auto Supplies Sdn. Bhd.* [1988] 1 MLJ 326, which is also authority for the proposition that a petitioner who complains that he is a victim of oppression should not unduly delay his approach to the Court, for otherwise he may be held to have acquiesced in the conduct complained of. The importance of this decision will become self-evident in a moment when we come to consider the point in time when a petitioner ought to approach the Court for relief where the complaint relates to a single act of oppression.

Now, it is inaccurate to state as a proposition of law that because of the 'present tense' of the language appearing in s. 181(1)(a) the oppression complained of must in every case continue right up to the date of the presentation of the petition. Indeed, Lord Wilberforce himself recognised this when he referred to a last minute correction as not having the effect of avoiding an inference of a propensity to oppress. But the reference by his Lordship to a last minute correction is but a mere illustration of a much wider principle. It is this.

Section 181(1)(a) is not, as observed by Lord Wilberforce, directed at specific or particular acts or omissions. It is directed at the nature of the conduct complained of. And where attention is called to particular acts or omissions, it is the effect of these which has to be considered. It is not and has never been the law that the section does not bite where what is complained of is but a single act or omission on the part of the wrongdoers.

A single act or omission may, by its very nature, have so devastating or far-reaching a consequence upon the rights of a member that its **effects** may be permanently felt. For the purposes of s. 181(1)(a) it is sufficient that the **effects** of a single act or omission are such that they persist at the date of the presentation of the petition. It is no answer, in those circumstances, for the perpetrators of the act or omission to allege that there was no continuous oppressive conduct up to the date of presentation of the petition.

Thus, in *Re Sindhri Iron Foundry (P) Ltd.* [1964] 34 Comp. Cas. 510, at p. 523, Mitra J, at first instance, when considering s. 397(1) of the Indian Companies Act 1956, which, prior to its amendment in 1965, was *in pari materia* with s. 210 of the United Kingdom Companies Act 1948 and read as follows:

> Section 397(1) Any members of a company who complain that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members (including any one or more of themselves) may apply to the Court for an order under this section. Provided such members have a right so to apply in virtue of s. 399.

said:

> In my view, the respondents' contention that in order to attract s. 397 of the Act, the oppressive act complained of must be wrongful conduct which continues over a period of time, is not tenable. The wrongful act complained of in this case is a single act of raid, but its effect, as I see it, is continuous and persistent oppression of the petitioners by the Prosad group. The claim of the Prosad group to have held an extraordinary general meeting, to have authorised issue and allotment of new shares, to have altered the character and composition of the board, unmistakably indicate its aim and object. The law, in my view, does not contemplate that a petitioner who is otherwise entitled to relief under this section must be able to show that there has been a continuous course of oppressive conduct over a period of time before he can obtain relief under this section.
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> If a petitioner is required to prove continued oppression for a period he must wait and remain dispossessed for a period of three months, six months or a year or more. But is that what is contemplated by s. 397 of the Act? If that is what is required by this particular section, it may very well be that by the time the petitioner becomes eligible to come to Court for relief, there may be nothing left in the assets of the company and this Court will be completely powerless to give him any relief whatsoever. In my view, the section neither contemplates nor requires a continuous course of oppressive wrongful conduct over a period of time. If that is so, namely, if it is required that the complainant must be able to prove that there was oppressive conduct over a long period of time, other questions would arise, namely, what would be the period of time before the expiry of which he cannot come to Court? Is it three months or six months or a year or more? It is not possible for the Court to lay down any standard with regard to the period of oppression, before which it is to be held that the party cannot come to Court. If the Court is satisfied that the conduct arising from a single wrongful act is such, that its effect will be a continuous course of oppression and there is no prospect of remedying the situation by the voluntary act of the party responsible for the wrongful act, this Court is entitled to interfere by appropriate order under s. 397 of the Act. In this case, it is true that so far as dispossession is concerned, there is one single wrongful act by which the petitioners have been dispossessed. But is there any prospect of the factory being restored to the petitioners' possession? There is none. And that being so, if the other conditions are fulfilled, appropriate orders should be made to provide for remedies to bring to an end the matters complained of.

The decision of Mitra J was upheld on appeal (see, *Ramashankar Prosad v. Sindhri Iron Foundry (P) Ltd.* AIR [1966] Cal. 512) with Mitter J making the following observation (at p. 529 of the report):

> It is no doubt true that this picture can only be pieced out after taking into consideration all the affidavits which are on record and the minutes of the meetings of the Board of Directors and of the shareholders of the company. What was lacking in the petition has been filled up by the subsequent affidavits and the Court must guide itself by all the evidence before it. It must be said that the petitioners had not made a strong case of oppression or mismanagement in the

petition. The only material averment of oppression alleged therein was the overthrow of the majority by forcible possession of the factory taken by Kedarnath Bhagat and others on 13 March 1963 but the evidence now available shows that the respondents had started their campaign sometime before that and that their plan was to dethrone the petitioners from the position held by them. If the board meeting of 21 January 1963 relied on by the respondents as also the extraordinary general meeting of 21 February 1963 was motivated by the desire to exclude the petitioners, clearly there was an oppression which could not be neutralised by the petitioners short of coming to Court and praying for necessary relief. The oppression was not of long duration when the petitioners came to Court but it was of such a nature that its effect would have persisted indefinitely and kept the petitioners under the complete mercy of the respondents.

We pause to observe that in coming to his conclusion Mitter J relied on the decision of the English Court of Appeal in *Re H.R. Harmer Ltd.* [1959] 1 WLR 62, where Jenkins LJ (later Lord Jenkins) approved the following passage in the judgment of Roxburgh J at first instance indicating the approach he adopted to s. 210 of the United Kingdom Act:

> The word 'oppression' is a word in common use and understanding in the English language. But I would just observe in passing that it does not say 'who complains of acts of oppression'; it says 'that the affairs of the company are being conducted in a manner oppressive ... .' In other words, I think **it invites attention, not to events considered in isolation, but to events considered as part of a consecutive story**; and it is because I take that view that I have not dealt (and do not propose to deal) with each of the items which I have enumerated one by one. (Emphasis added.)

This same approach commended itself to Anuar J (now CJ (Malaya)) in *Kumagai Gumi Co. Ltd. v. Zenecon-Kumagai Sdn. Bhd. & Ors.* [1994] 2 MLJ 789 and his decision in this respect was upheld by this Court.

Section 181(1)(a) of the Act therefore looks to the effect and consequences of the wrong done in determining whether there is oppressive conduct in any given case. Any other construction upon the section would denude it of its beneficial effect and frustrate the intention of Parliament. If the far more restrictive s. 210 of the United Kingdom statute received a liberal interpretation in the hands of the House of Lords in the *Scottish Co-operative* case, it is only appropriate that the wider s. 181 receives an equally, if not more, liberal interpretation. Indeed, the Court of Appeal of New Zealand has adopted such an approach to s. 209 of their Companies Act 1955 (introduced by an amendment made in 1980) which in several respects resembles s. 181.

In *Thomas v. H.W. Thomas Ltd.* [1984] 2 ACLC 610, at p. 616, Richardson J explained the approach that ought to be taken in respect of the New Zealand provision as follows:

> The foundation of the jurisdiction under the recast provision is a complaint by a member of oppression, unfair discrimination or unfair prejudice to him in the conduct of the affairs of the company or in the acts of the company. That is sub-s. (1). Then sub-s. (2) provides that on any such application the Court may grant the statutory relief where it considers it 'just and equitable' to do so. It follows in my view that the considerations underlying the exercise of the just and equitable winding-up jurisdiction bear on the exercise of the jurisdiction under subs. (2). Having regard to that changed, statutory pattern, the differing views expressed as to the test under the repealed provisions and the wider global expression 'oppressive, unfairly discriminatory or unfairly prejudicial', it would I think be wrong to assume that the new section was intended to adopt the meaning accorded to 'oppressive' under the old English provision by Viscount Simonds in *Scottish Co-operative Wholesale Society Ltd. v. Meyer*. And against that background it would be unfortunate if we were to carry over into the interpretation of the new legislation any preconceptions stemming from the approach taken in other jurisdictions to the counterpart of the former New Zealand provision [in terms identical to s. 210 of the United Kingdom Companies Act 1948].

We have earlier in this judgment referred to both acts and omissions as constituting oppressive conduct. That oppression may take the form of omission or inaction is exemplified by the decision in *Scottish Co-operative Wholesale Society Ltd. v. Meyer (supra)*.

What we have said thus far deals with the first and second grounds advanced by the learned Judge for striking out the petition. It is plain that his finding that the petition contains no allegation of mismanagement or unfairness completely overlooks the nature of the case that he was called to adjudicate upon. It follows from what we have said earlier in this judgment - indeed it is axiomatic - mismanagement is not an essential element of the concept of oppression. Consequently, an allegation of mismanagement does not have to be pleaded in every case of alleged oppression to make the petition an acceptable pleading. It all depends on the facts of each case. All that we have said in relation to the pleading point in an oppression case applies with equal force to the learned Judge's criticism of the appellant's failure to plead unfairness on the part of the directors of the Company. Whether there is oppression or unfairness is to be inferentially deduced from the facts of a given case.

In holding that there was no oppression continuing up to the date of the presentation of the petition the learned Judge did not sufficiently direct his attention to the effect of the single act complained of by the appellant and alleged by him as amounting to oppression. Had the learned Judge sufficiently and correctly directed himself on the relevant law, he would have looked to the continuing effect of the act complained of and not for a continuing course

of conduct. In failing to do this, he certainly fell into error. His failure to direct himself along the lines we have indicated earlier in this judgment amounts, in our view to a serious misdirection by way of non-direction which has occasioned a miscarriage of justice.

Before we proceed to deal with the relevant law touching upon the third reason advanced by the learned Judge, we must, for the sake of completeness, address another aspect of the advice of Lord Wilberforce that requires clarification. It has to do with the question whether it is only a minority shareholder who may have resort to s. 181.

Now, it cannot be gainsaid that one who reads the advice of Lord Wilberforce in *Re Kong Thai Sawmill* may be led to assume that only minority shareholders may apply for relief under s. 181. We categorically state that this is certainly not the case. It must not be forgotten that s. 210 of United Kingdom Companies Act 1948 was placed under the heading 'Minorities', clearly indicating that those who could seek relief must be in the minority. There is no such classification in the Act. Consequently, relief under s. 181 may be had by a majority of shareholders in circumstances where they are unable for any reason to exert their will at a general meeting of their company. We therefore accept as correct the statement of the law by Anuar J (now CJ (Malaya)) in *Kumagai Gumi (supra)* when he held (at p. 808 of the report) that "relief under s. 181 is available to majority shareholders who are not in control of the management of the company and who, for any given reason, are unable to control the board, e.g. because they have agreed to a management power sharing formula in a separate agreement among the shareholders."

We next turn to consider the category of persons within a company who may invoke the provisions of s. 181 of the Act. It is an obvious and simple point on which comment would ordinarily have been unnecessary. But we are compelled to deal with this issue because it is one of the points relied upon by the Judge for striking out the appellant's petition.

Section 181 opens with the words: "Any member". There then follows a recital of the other persons who are declared to be entitled to move the Court under the section. The expression "member" is not defined in s. 4 of the Act. However, the meaning of that term is to be found in s. 16(6) of the Act which provides as follows:

> (6) The subscribers to the memorandum shall be deemed to have agreed to become members of the company and on the incorporation of the company shall be entered as members in its register of members, and every other person who agrees to become a member of a company and whose name is entered in its register of members shall be a member of the company.

A reading of s. 181 reveals that in the latter part of para. (a) of sub-s. (1) to that section the Legislature has used the expression "members, shareholders ... of the company". However, it does not require much intellectual exercise to realise that the sub-section, read as a whole, when using the terms "member" and "shareholder", refers to the same category of persons within the company. The result, therefore, is that, **as a general rule**, only one who comes within the terms of s. 16(6) of the Act may present a petition under s. 181. Put another way, **in general**, a petitioner who applies under the section must be able to demonstrate that his name appears on a company's register of members at the date of presentation of the petition: if he is unable to do so, then he has no standing to invoke the jurisdiction conferred upon the Court by the section. In this respect, the section differs materially from s. 459 of the Companies Act 1985 of the United Kingdom, for under the latter provision past members have been expressly given *locus standi* to apply for relief under it.

We have, in stating the applicable rule as to standing under s. 181 taken great care in emphasising that what has been expressed is the general rule and not a universal rule. We have done so to bring home the point that there may be cases where an application of the general rule would be unfair or unjust.

Take, for instance, the case of a person who has agreed to become a member, but whose name has been omitted from the register of members. If it transpires that prior to the dispute leading to the presentation of the petition, a company or its board had always treated the complainant as a member, it would not be open to them to assert that the petitioner lacked *locus standi*. Examples may be multiplied without any principle emerging from them. Take the facts of this very case. Here we have a fact pattern where the appellant's membership of the company had been terminated in circumstances which are being challenged by him on substantial grounds. The substantial ground he complains of is the deprivation of his membership in the Company. He says that the circumstances attending this deprivation of membership falls within the framework of s. 181(1)(a) and (b). It is the company, acting through its board, that had deprived the appellant of the status of a member. Can the company be now heard to say that the appellant is no longer a member and is therefore disentitled from moving the Court under s. 181 of the Act and from questioning that very deprivation in proceedings brought under the section? We think not. For it does not lie in the mouth of the alleged wrongdoers to say that the appellant has no ground to stand on after having cut the very ground from under his feet.

The true principle which governs such cases as the present is housed in the doctrine of estoppel. The doctrine has reached a stage where it may be applied to prevent or preclude a litigant from raising the provisions of a statute in

answer to a claim made against him in circumstances where it would be unjust or inequitable to permit him so to do.

The leading authority on the application of the doctrine to prevent reliance upon a statute is *Alfred Templeton & Ors. v. Low Yat Holdings Sdn. Bhd. & Anor.* [1989] 2 MLJ 202, at pp. 244-5. There, Edgar Joseph Jr. J (as he then was), in an illuminating judgment, held a defendant who had been guilty of unconscionable and inequitable conduct to be debarred from relying upon the provisions of the Limitation Act 1953.

The doctrine has been held to be capable of conferring rights upon a litigant by precluding his opponent from challenging title. See *West v. Pollack & Freemantle* [1937] T.P.D. (S.A.) 64.

Additionally, the wide variety of circumstances in which the doctrine of estoppel operates in the field of private law was recently considered in a judgment of this Court in *Boustead Trading [1985] Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd.* [1995] 4 CLJ 283; [1995] 3 MLJ 331.

The equitable jurisdiction by which a personal bar is placed upon a litigant from raising or relying upon the provisions of a statute is also contained in the maxim "equity will not permit statute to be used as an engine of fraud." In *Rasiah Munusamy v. Lim Tan & Sons Sdn. Bhd.* [1985] 2 MLJ 291, at p. 296, Mohamed Azmi SCJ described the nature and scope of the maxim in clarity of language that merits recollection:

> It is not a *(sic)* fraud in the common law sense, but an unmeritorious and unconscionable conduct which is known as constructive or equitable fraud (see Spry on *Equitable Remedies,* Second Edn., p. 236).

In its early history, the maxim was used to prevent litigants from raising or relying upon the Statute of Uses, the Statute of Wills and the Statute of Frauds. In modern times it has been used to prevent a litigant from relying upon a provision in the United Kingdom Law of Property Act 1925 (see, *Bannister v. Bannister* [1948] 2 All ER 133) and more recently in the context of defeating title under the Torrens System (see, *Bahr & Anor. v. Nicolay & Ors. (No. 2)* [1987] 164 CLR 604). The category or class of statutes to which the maxim may be applied are not closed and its development, like much of equity jurisprudence, falls to be dealt with on a case by case basis, taking into account policy considerations that may govern a particular statutory provision.

It may therefore be quite safely stated that if facts emerge from which it may be determined that it is unjust or inequitable to permit a respondent to a petition under s. 181 to assert or to contend that a petitioner has no *locus*

a *standi* to move the Court, then, he will be estopped from so asserting. Stated in another fashion, a respondent who is guilty of unconscionable or inequitable conduct will not be permitted to raise or rely upon the requirement of membership in order to defeat a petitioner's standing as this would amount to his using statute as an engine of fraud. It does not matter how the proposition *b* is formulated so long it has the effect adverted to.

We have earlier made our observations upon the conduct of the Company which by its own action had deprived the petitioner of membership and had then asserted his lack of standing to move a petition under s. 181. This conduct does not, in our judgment, entitle the company (for it was the one *c* who raised the issue) from asserting that the appellant lacks standing to present the petition. It matters not that it is the petitioner who relies upon the estoppel. For the true nature of the doctrine is not that it may not be used to found a cause of action, but that it may be invoked to prevent the respondents from asserting the existence or non-existence of facts, the existence or non-existence *d* of which would destroy a cause of action.

Unfortunately, the learned Judge in the present case did not address his mind to the wider concepts that were applicable to the facts before him. Instead, he approached the case along narrow lines, causing him to fall into error and to misstate the relevant law. His finding, the effect of which was that the *e* appellant lacked standing, was based upon a misunderstanding of s. 181 of the Act.

To summarise, the learned Judge was wrong in his approach to the procedural point; he was wrong in his interpretation of the term "oppression" appearing *f* in para. (a) to sub-section (1) of section 181 and in its application to the facts of the instant case; he was wrong in requiring an express plea of mismanagement or unfairness, and he was wrong in denying the appellant standing to present the petition.

The facts as pleaded in the petition certainly disclose an arguable case under *g* s. 181(1)(a) and (b) of the Act. There are serious questions that require mature consideration. All we say is that the matters alleged in the petition, if true, may **in law** amount to oppression or unfairness. Whether there was oppression or unfair discrimination is a matter for the Judge who will hear the petition on its merits to decide.

h

The power to summarily strike out a pleading must be sparingly exercised and in respect of the philosophy that underlies the exercise of that power we can do better than to quote from the judgment of Mohamed Dzaiddin SCJ in *Bandar Builder Sdn. Bhd. v. United Malayan Banking Corporation Bhd.* [1993] 4 CLJ 77; [1993] 3 MLJ 36, at p. 44: *i*

> This Court as well as the Court below are not concerned at this stage with the respective merits of the claims. But what we have to consider is whether the counterclaim discloses some cause of action and, likewise, whether the defence to counterclaim raises a reasonable defence. It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the Judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (see *Moore v. Lawson* [1915] 31 TLR 418 and *Wenlock v. Moloney & Ors.* [1965] 1 WLR 1238).

For the reasons appearing in this judgment we had no alternative but to reverse the learned Judge.

There is one last matter that requires to be dealt with. We observe that the record provided mentions a second application by the company by way of summons to set aside service of the petition. The learned Judge also made an order in terms of that summons. Although there is a ground in the memorandum of appeal directed at the order which the Judge had made on the summons, this was never pursued and no argument was addressed by either side upon this aspect of the case. Neither was the summons included in the record provided. The Judge merely mentions it *en passant* in the concluding paragraph of his judgment. For this reason, we propose to say nothing about it. Nevertheless, because the orders made by the Judge were in a composite form, we allowed the appeal *in toto*, set aside the whole of his order, including the order made on the summons. The petition was restored to file for hearing on the merits. The appellant was to have the costs of this appeal and the costs incurred in the Court below.

Reported by Isaac TJ Lee